92-1154

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JAMES FRANCIS O'HARA, III, ET AL.,

Petitioners,

v.

JACQUELINE KOVENS,
PERSONAL REPRESENTATIVE OF THE ESTATE OF
IRVIN KOVENS, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND AND THE COURT OF SPECIAL APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

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831

QUESTION PRESENTED

Does the separation of powers doctrine preclude a court, in a civil suit for damages involving only private individuals, from receiving evidence of the intent and motives of a state governor, who has civil immunity, in rejecting or supporting certain legislation, so as to deny private litigants the opportunity to prove a cause of action that requires evidence of such intent or motives?

LIST OF PARTIES

Petitioners:

James Francis O'Hara, III

Michael Patrick O'Hara

Respondents:

Jacqueline Kovens, Personal Representative of the Estate of Irvin Kovens

W. Dale Hess

Harry W. Rodgers, III

William A. Rodgers

Ernest N. Cory, Jr.

The Eugene B. Casey Trust

Irving T. Schwartz

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IN THE
SUPREME COURT OF THE UNITED STATES

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND AND THE COURT OF APPEALS OF Maryland

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PETITION FOR WRIT

The Petitioners, James Francis O'Hara, III and Michael Patrick O'Hara, by their attorneys, Paul Mark Sandler,

Raymond Daniel Burke and Freishtat & Sandler, pursuant to Rule 12 of the Supreme Court Rules, respectfully petition this Honorable Court for a Writ of Certiorari to review the decision of the Court of Special Appeals of Maryland filed on May 8, 1992 affirming the judgment of the Circuit Court for Baltimore City which granted summary judgment in favor of the Respondents.

Opinions Below

The opinion of the Court of Special Appeals of Maryland is reported as O'Hara v. Kovens, 92 Md. App. 9, 606 A.2d 286 (1992), and is reprinted in the appendix hereto at 1a, infra. The Order of the Court of Appeals of Maryland, dated October 7, 1992, denying the Petitioners' Petition for Writ of

Certiorari is reported at 328 Md. 93 (1992) and reprinted in the appendix at 46a-47a. Prior opinions of the Court of Appeals of Maryland and Court of Special Appeals of Maryland in this case, relating to the procedural background, are reported as Mandel v. O'Hara, 320 Md. 103, 576 A.2d 766 (1990); O'Hara v. Kovens, 305 Md. 280, 503 A.2d 1313 (1986); and as O'Hara v. Kovens, 60 Md. App. 619, 484 A.2d 275 (1984).

Jurisdiction

The decision of the Court of Special Appeals of Maryland affirming the entry of summary judgment by the Circuit Court for Baltimore City was filed on May 8, 1992. The Petitioners filed a timely Petition for Writ of Certiorari with the Court of Appeals of

Maryland, which was denied by that Court on October 7, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§1257 and 2106.

Constitutional Provisions Involved

U.S. Const. Art. IV, §4 provides as follows:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against invasion; and on application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

Md. Decl. of Rights Art. 8 provides as follows:

> That the Legislative, Executive and Judicial Powers of Government ought to be forever separate and distinct from each other; and no person exercising the functions of one of said Departments shall assume or discharge the duties of any other.

Statement of the Case

This action was commenced on November 22, 1978 when suit was filed on behalf of the Petitioners, individually and as guardians of the property of their mother, Josephine M. O'Hara, in the Circuit Court for Baltimore City against a former governor of the State of Maryland, Marvin Mandel, (hereinafter "Mandel"), the Respondents, W. Dale Hess, Harry W. Rodgers, III, William A. Rodgers, Ernest N. Cory, Jr., Irving W. Schwartz, Eugene B. Casey and Irvin Kovens.[1] This civil suit stated a cause of action for common law fraud arising from an alleged scheme pertaining to

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[1]Casey and Kovens died during the pendency of this case, and representatives of their estates were substituted as parties to this action and are Respondents hereto.

certain legislation in the Maryland General Assembly concerning the horse racing industry.[2]

The Petitioners were the owners of the Southern Maryland Agricultural Fair Association, Inc., (hereinafter "Marlboro Racetrack"), a half-mile track located in Prince George's County, Maryland. In February, 1971, they contracted with the owners of Hagerstown Racetrack, a similar track located in Washington County, Maryland, for the transfer to Marlboro Racetrack of the racing days allotted by law to the Hagerstown track. Since the Maryland

[2]The suit originally contained a second count alleging a violation of securities laws. However, it was subsequently conceded that this claim was barred by the applicable statute of limitations. See O'Hara v. Kovens, 305 Md. 280, 283 n.1, 503 A.2d 313, 314 (1986).

horse racing industry is regulated by the State and the permanent transfer of racing dates requires the approval of the Maryland General Assembly, a bill was drafted by attorneys for the two racetracks and submitted to the legislature. Following its passage, however, the bill was vetoed by then-Governor Mandel on May 28, 1971.

The Petitioners' suit alleges that this veto was part of a scheme among Mandel and the Respondents to depress the value of the stock of Marlboro Racetrack, obtain a controlling interest in the racetrack, and then benefit by having Mandel work to have his veto overridden, so as to permit the transfer of racing days, and to support other legislation favorable to Marlboro

Racetrack. Specifically, the suit alleges that a group, including the Respondents, conspired with Mandel to veto the legislation transferring racing days, and, on June 1, 1971, began purchasing shares of Marlboro Racetrack at a depressed price, ultimately acquiring a controlling interest in December, 1971. It is alleged that the true identities of the persons having the beneficial interest in these stock purchases were intentionally concealed. It is further alleged that the Respondents conspired with Mandel to have his veto overridden by the legislature, which, in fact, did occur on January 12, 1972. The veto override resulted in the transfer of racing days from Hagerstown to Marlboro Racetrack,

thereby substantially increasing the value of stock in Marlboro Racetrack. It is additionally alleged that the Respondents and Mandel worked to secure passage during the 1972 session of the Maryland General Assembly of a Racetrack Consolidation Bill, which further increased the value of Marlboro Racetrack.

On November 24, 1975, Mandel and five (5) co-defendants, the Respondents, W. Dale Hess, Harry W. Rodgers, III, William A. Rodgers, Irvin Kovens, and Ernest N. Cory, Jr., were indicted by a Federal Grand Jury for the District of Maryland and charged with twenty-four (24) counts of mail fraud and prohibited patterns of racketeering activities in violation of federal law. In great

part, this indictment was based upon the alleged conspiracy among Mandel, the Respondents and others with respect to the veto of legislation that would have transferred racing days to Marlboro Racetrack, the acquisition of Marlboro Racetrack at a depressed price, the concealment of the identities of the true parties in interest to the purchase of Marlboro Racetrack, and the subsequent override of the veto and enactment of legislation favorable to the new owners of Marlboro Racetrack.[3] All six criminal defendants were convicted as a result of a jury verdict returned on August 23, 1977 in the United States District Court for the District of Maryland. These convictions

[3]The Federal criminal statutes were 18 U.S.C. §§1341 and 1961 et seq.

were vacated by the United States Court of Appeals for the Fourth Circuit on January 11, 1979, but were affirmed by an equally divided court following an en banc hearing on July 20, 1979. United States v. Mandel, 591 F.2d 1347 (4th Cir. 1979), vacated then affirmed en banc, 602 F.2d 653, second reh. en banc denied, 609 F.2d 1076, cert. denied, 445 U.S. 961 (1980).[4]

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[4]See generally United States v. Mandel, 550 F.2d 1001 (4th Cir. 1977); United States v. Mandel, 432 F. Supp. 258 (D. Md. 1977); United States v. Mandel, 431 F. Supp. 90 (D. Md. 1977); United States v. Mandel, 415 F. Supp. 1079 (D. Md. 1976); United States v. Mandel, 415 F. Supp. 1033 (D. Md. 1976); United States v. Mandel, 415 F. Supp. 1025 (D. Md. 1976); United States v. Mandel, 415 F. Supp. 997 (D. Md. 1976); United States v. Mandel, 408 F. Supp. 673 (D. Md. 1975). Nearly ten (10) years after the convictions and five (5) years after the criminal defendants served their sentences, this Court decided McNally v. United States, 483 U.S. 350 (1987), holding that 18 U.S.C.

As a result of the criminal prosecution, the Petitioners became aware of their civil cause of action and filed suit. On December 2, 1983, the Circuit Court for Baltimore City granted summary judgment in favor of all defendants on the ground that the action was barred by the applicable statute of limitations. On appeal, the Court of Special Appeals of Maryland affirmed this Order as to the Petitioners in their individual capacities, but reversed as to the claim on behalf of their mother's estate. O'Hara v.

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§1341 does not protect against schemes to defraud persons of rights such as the right to honest government. As a result, the United States District Court granted writs of error coram nobis to vacate the convictions. United States v. Mandel, 672 F. Supp. 864 (D. Md. 1987), affirmed, 862 F.2d 1067 (4th Cir 1988).

Kovens, 60 Md. App. 619, 484 A.2d 275 (1984). The Court of Appeals of Maryland granted certiorari, vacated the entry of summary judgment, and remanded the case for further proceedings in the Circuit Court for Baltimore City, ruling that factual questions as to when the cause of action accrued were to be decided by the jury. O'Hara v. Kovens, 305 Md. 280, 503 A.2d 1313 (1986).

On remand, the Estate of Josephine O'Hara voluntarily dismissed its claim against Mandel and settled with the remaining defendants. Subsequently, in September, 1989, a jury trial was held solely on the issue of whether the Petitioners' individual claims were barred by limitations. By special verdict, the jury found that the

Petitioners' claims were not barred by limitations, because they should not have been aware, before the criminal indictments, of any alleged wrongdoing. Trial on the merits was then scheduled to commence on June 4, 1990.

On May 15, 1990, Mandel filed a Motion to Dismiss or for Summary Judgment on the ground that he was absolutely immune from civil liability. The Circuit Court for Baltimore City denied this Motion, and Mandel noted an appeal to the Court of Special Appeals, along with a request for stay and a Petition for Writ of Certiorari to the Court of Appeals. On June 1, 1990, the Court of Special Appeals entered a stay, and the Court of Appeals issued a Writ of Certiorari. On July 27, 1990, the

Court of Appeals ruled, "as a matter of Maryland Common Law, that a Governor of Maryland enjoys absolute immunity from liability for damages for non-constitutional torts based on the approval or veto of legislative enactments." Mandel v. O'Hara, 320 Md. 103, 134, 576 A.2d 766, 781 (1990). Accordingly, the claim against Mandel was dismissed.

On March 14, 1991, the Respondent, Jacqueline Kovens, Personal Representative of the Estate of Irvin Kovens, filed a Motion to Dismiss or for Summary Judgment, inter alia, on the following ground:

> As a matter of law, the common law fraud claim is legally insufficient because it necessarily requires judicial inquiry into motives for a valid legislative act, which inquiry is forbidden by the

> separation of powers doctrine embodied in Article 8 of the Maryland Declaration of Rights.

The remaining Respondents joined in this Motion. On April 1, 1991, the Circuit Court for Baltimore City granted the Motion and entered summary judgment in favor of all remaining defendants.

The Petitioners noted an appeal to the Court of Special Appeals.[5] On May 8, 1992, the Court of Special Appeals affirmed the decision of the Circuit Court for Baltimore City, specifically holding "that the separation of powers doctrine bars judicial inquiry into a governor's motives for his veto. Since this action is dependent upon such a judicial inquiry, the grant of summary

[5]The Respondents also noted a Cross-Appeal which challenged the verdict entered by the jury in September, 1989 on the issue of limitations.

judgment was proper." O'Hara v. Kovens, supra, 92 Md. App. at 27, 606 A.2d at 295. Apx. 44a-45a.

The Respondents' Petition for Writ of Certiorari was denied by the Court of Appeals on October 7, 1992.

Reasons For Allowance Of The Writ

The Court of Special Appeals relied solely and explicitly on the separation of powers doctrine as its rationale for precluding any judicial inquiry into the intent and motives of a former governor with respect to his decisions concerning certain legislation. While recognizing that "the separation of powers principal is evidenced by, and inferred from, the Constitution of the United States," Id. at 21, 606 A.2d at 291, Apx. 28a, the Court proceeded to employ that doctrine

in a manner that is a perversion of its role as an inherent and integral element of the republican form of government expressly guaranteed by U.S. Const. Art. IV, §4. See VanSickle v. Shanahan, 511 P.2d 223 (Kan. 1973). Indeed, the Court's decision is in conflict with the related criminal proceedings in the federal courts and misapplies a decision of this Court to support its result. Moreover, it is a decision which has no support or cited precedent in any other forum. The result is a decision which denies private litigants an opportunity to prove the elements of a civil cause of action without any corresponding benefit to the effective administration of government.

A. The Federal Judiciary Previously Made Substantial Inquiry Into The Very Intent And Motives Which The State Court Found To Be Absolutely Protected From Judicial Inquiry.

The decision of the Court of Special Appeals is based expressly on the finding that the separation of powers doctrine absolutely prohibits any judicial inquiry into the intent and motives of Mandel with respect to the racetrack legislation. As a result, the Petitioners are precluded from proving one of the necessary elements of their cause of action. Glaringly absent in the opinion of the Court, however, is reference to the fact of the long criminal prosecution of Mandel and five (5) of the Respondents hereto for the very acts which are at issue in this civil proceeding, specifically including the veto, the override of the veto, and

the enactment of other favorable legislation. See United States v. Mandel, supra, 591 F.2d at 1354-1355. It is clear that the court received evidence bearing on Mandel's intent and motives with respect to this legislation as part of the criminal case.

The Court of Special Appeals decision is not based, in any way, on immunity, since immunity was not available to the Respondents. Id. at 18-19, 606 A.2d at 290-291. Apx. at 23a-24a. While immunity requires a distinction between civil and criminal liability, the separation of powers doctrine is of constitutional dimension and governs the relationships among the three branches of government regardless of context. Cf. Myers v. United States,

272 U.S. 52 (1926). Accordingly, if the separation of powers doctrine precludes judicial inquiry into Mandel's intent and motives with respect to the racetrack legislation, the criminal prosecution could not have taken place.

B. There Is No Precedent For The Lower Court's Decision.

The Court of Special Appeals expressly recognized that there is no precedent which provides direct support for its opinion:

> The real question here is whether judicial investigation into the governor's motives for exercising his veto power so encroaches upon the executive's essential functions as to be forbidden by the separation of powers doctrine. Although we have found no case directly on point, a fair reading of relevant caselaw indicates that the answer to this question can only be yes.

Id. at 23, 606 A.2d at 293. Apx. at 34a. The caselaw relied upon, however, is plainly inapposite. Each case cited by the Court of Special Appeals involved a suit challenging the validity of a specific legislative act.[6] Particularly inappropriate is the reliance on this Court's opinion in Fletcher v. Peck. Chief Justice Marshall summarized the issue in that case:

> One individual who holds lands in the state of Georgia under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns, as a breach,

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[6] See Fletcher v. Peck, 6 Cranch. 87 (1810); Sugarloaf Citizens Assoc, Inc. v. Gudis, 319 Md. 558, 573 A.2d 1325 (1990); Montgomery County v. Maryland Soft Drink Association, Inc., 281 Md. 116, 377 A.2d 486 (1977); County Council For Montgomery County v. District Land Corp., 274 Md. 691, 337 A.2d 712 (1975); Hammond v. Lancaster, 194 Md. 462, 71 A.2d 474 (1950).

> that some of the members of the legislature were induced to vote in favor of the law, which constituted the contract, by being promised an interest in it, and that therefore the act is a mere nullity.

6 Cranch at 131. The case involved an attempt to nullify a land transaction involving the State of Georgia on the grounds that members of the legislature had an interest in the transaction. This is simply not analogous to the case at issue. While the separation of powers doctrine may restrain the judiciary from inquiring into the motives of elected officials with respect to the validity of legislation, there is no precedent or support for an interpretation which prevents the judiciary from adjudicating a private cause of action for fraud against

private individuals which involved otherwise valid legislative acts.

The Court's reliance on these cases is clearly strained and, indeed, misinterprets the proper role of the separation of powers doctrine. The case sub judice is not an effort to void legislation. In fact, the legislation at issue would have benefitted Petitioners had they not been allegedly defrauded into conveying Marlboro Racetrack at a depressed value. There is no valid support anywhere for the opinion of the Court below.

C. The Decision Precludes A Private Right Without Any Corresponding Benefit To The Public.

The Court of Special Appeals has invoked the separation of powers doctrine in a manner that precludes a

private right of action while failing to provide any corresponding public benefit. The doctrine's purpose is to prevent one branch of government from "the exercise of arbitrary power" with respect to another. Myers v. United States, 272 U.S. 52, 85 (1926), (Brandeis, J. dissenting). No such danger, however, arises from the prospect of receiving evidence as to Mandel's motives in support of a private cause of action against private individuals. Indeed, there could be no effect on public administration, since, regardless of the nature of Mandel's testimony, he has been granted absolute immunity from suit by the Court of Appeals in Mandel v. O'Hara, 320 Md. 103, 576 A.2d 766 (1990). Accordingly,

there is no threatened liability and, therefore, no means for such potential liability to inhibit executive or legislative conduct.

In Scheuer v. Rhodes, 416 U.S. 232, 240 (1974), this Court found that the rationale for official immunity rests on the injustice of subjecting an official to liability who is legally required to exercise discretion, and the danger of inhibiting the willingness to exercise judgment with decisiveness caused by a threat of potential liability. With the grant of absolute immunity by the Court of Appeals, the governor and other officials are fully protected from any liability which may impede or deter them in the exercise of their official

duties. Accordingly, the interest in effective public administration is fully protected.

There is no public interest which requires the additional step taken by the Court of Special Appeals to preclude any inquiry into Mandel's intent or motives in a private cause of action to which Mandel is not, and, by law, could not be, a party. Mandel already has absolute immunity from civil liability. The effect of the opinion below is not to ensure more effective public administration, but, rather, extends a form of immunity to private individuals who may have wrongly benefitted from improper acts of a public official.

CONCLUSION

The opinion below misapplies the separation of powers doctrine. It first prohibits any judicial inquiry into the intent and motives of a former governor, but ignores a lengthy criminal prosecution on the same subject. Next, it stands without any supporting precedent as an extension of the separation of powers doctrine to preclude a private cause of action in a way not previously recognized by any court. Lastly, since the former governor has absolute civil immunity, the decision takes away a private right without bestowing any benefit to effective public administration by limiting judicial inquiry.

For each of these reasons, the opinion of the Court of Special Appeals wrongly interprets the separation of powers doctrine and is destructive of the republican form of government guaranteed by U.S. Const. Art. IV, §4. The decision makes bad precedent and should not be sustained by this Court.

Respectfully submitted,

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REPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1305

September Term, 1991

JAMES FRANCIS O'HARA, III et al.

v.

JACQUELINE KOVENS, PERSONAL REPRESENTATIVE OF THE ESTATE OF IRVIN KOVENS, et al.

Moylan,
Cathell,
Motz,

JJ.

Opinion by Motz, J.

Filed: May 8, 1992

This appeal is the latest, and perhaps the final, chapter of the litigation arising out of the alleged impropriety involved in former Governor Marvin Mandel's 1971 veto of legislation to provide additional racing dates for a Maryland race track. Critical to determination of this case is resolution of the question of whether the former governor's motives for that veto can be examined by a court in a tort action against his alleged co-conspirators based on the veto. Because the separation of power doctrine bars judicial inquiry into the former governor's motives for his veto, we affirm the order of the Circuit Court for Baltimore City (Friedman, J.)

granting summary judgment to the alleged co-conspirators.

(i)

On November 22, 1978, appellants, James Francis O'Hara, III, and Michael Patrick O'Hara, individually and as guardians of the property of their mother, Josephine M. O'Hara (collectively "the O'Haras") filed a declaration against Marvin Mandel, a former governor of the State of Maryland, W. Dale Hess, Harry W. Rodgers, III, William A. Rodgers, Ernest N. Cory, Jr., Irving T. Schwartz, Eugene B. Casey, and Irvin Kovens (collectively "the defendants").[1]

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[1]Defendants Casey and Kovens died while this action was pending and representatives of their respective estates were substituted as parties defendant.

In that declaration the O'Haras alleged a claim for "common law fraud and deceit."[2] They asserted that they were stockholders of Southern Maryland Agriculture Fair Association, Inc. ("Marlboro Race Track"), and that following indictments detailed in United States v. Mandel, 591 F.2d 1347, vacated, 602 F.2d 655 (4th Cir. 1979), cert. denied, 445 U.S. 961 (1988), they discovered that "at some point between January 7, 1969 and May 28, 1971" the defendants had made representations and failed to disclose material facts in

[2]The declaration originally contained an additional count alleging a violation of the Maryland Securities Act. During this litigation, the O'Haras have conceded that the securities claim is barred by limitations. O'Hara v. Kovens, 305 Md. 280, 283 n.1 (1986). Accordingly, the only remaining claim is for common law fraud.

order to induce the O'Haras "to sell stock in the Marlboro Race Track at a lower price than if defendants had not made such representations or omissions." The O'Haras further allege that the defendants knowingly and intentionally, but secretly, conspired to do this and that the O'Haras relied upon the defendants' representations and omissions in determining to sell their stock.

In March 1971, House Bill 1128 was introduced in the House of Delegates for the purpose of obtaining the approval of the General Assembly for the permanent transfer of eighteen (18) racing days from Hagerstown Race Track to Marlboro Race Track. On May 28, 1971, former governor Mandel vetoed House Bill 1128,

allegedly "with the intent and the knowledge that his veto would depress the value of the stock of Marlboro Race Track and would deceive and defraud Plaintiffs and other owners of the stock of Marlboro Race Track about the value of their stock and the price that they could expect to obtain for the stock for sale on the open market."

Shortly thereafter, on June 1, 1971, defendant Schwartz "purported to buy fifteen thousand (15,000) shares of the Marlboro Race Track, at $7.00 per share" and on two subsequent occasions, purchased additional stock, buying a total of 2,000 additional shares. The O'Haras allege that on these occasions, Schwartz "acted to conceal the fact that he had no beneficial interest in the

stock . . . and that the true beneficial owner was" defendant Kovens. It was further alleged that by use of the name of defendant Cory, individually and as attorney, defendants "concealed the fact that they were, during 1971, seeking to acquire" the O'Haras' interest in the race track. In December 1971, the defendants "arranged for the purchase of the controlling interest in Marlboro Race Track [from the O'Haras] in such a way as to conceal their true identities as purchasers of the stock." During 1971 and thereafter, defendants used the name of defendant Schwartz to conceal the fact that "defendant Kovens was the true beneficial owner of the additional financial interests purchased in Marlboro Race Track acquired on December

31, 1971."[3] On and after January 1, 1972, the defendants assertedly arranged for defendant Casey to represent himself falsely as the new owner of Marlboro Race Track, in order to conceal the financial interest of the other defendants in the race track. On January 7, 1992, Casey wrote a letter to all members of the General Assembly of

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[3]The Court of Appeals noted that when the O'Haras sold their stock in December 1971, they "at least suspected that the undisclosed principals represented by Cory were persons with some political 'clout' who would attempt to have the General Assembly override the veto. Because the O'Haras were out of the Marlboro stock at a price which was satisfactory to them," they "could not have cared less who the specific purchasers were" or "if friends of Governor Mandel purchased Marlboro stock or had benefitted from the veto override." O'Hara v. Kovens, 305 Md. 280, 293 (1986). It was, thus, not fraud in general, but apparently only fraud that might have disadvantaged them that concerned the O'Haras.

Maryland to induce them to override then Governor Mandel's veto of House Bill 1128. Override of the veto, by providing the race track with eighteen (18) additional racing days, would markedly increase the value of the Marlboro Race Track stock.

Moreover, the defendants allegedly conspired with former governor Mandel so that he would "by virtue of his office as Governor of the State of Maryland . . . act with the intent to induce the legislature to override the veto of May 28, 1971." On January 12, 1972, the General Assembly did, in fact, override the veto, thereby permanently transferring to Marlboro Race Track the eighteen (18) racing days which formerly had been run at Hagerstown Race Track.

Finally, the O'Haras alleged that during 1972 and thereafter, defendants used defendant Cory and "the names of approximately seven (7) of their friends and family members in such a way to conceal the identity of the true beneficial owners of financial interest in Marlboro Race Track." Former Governor Mandel and the other defendants assertedly "used their efforts to induce the General Assembly of Maryland to pass the Race Track Consolidation Bill (Senate Bill 928 of 1972) the effect of which, as the defendants well knew, would be to further increase the value of Marlboro Race Track, theretofore, fraudulently acquired from Plaintiffs." In December 1972, the defendants caused the merger of the Marlboro Race Track

with the Bowie Race Track, thereby further increasing the value of Marlboro Race Track stock, which they had assertedly acquired by fraud from the O'Haras.

On December 2, 1983, the Circuit Court for Baltimore City granted summary judgment to all defendants on the ground that this action was time-barred. On appeal, this court affirmed this order as to James and Michael O'Hara in their individual capacities, but reversed as to their claim on behalf of their mother's estate. O'Hara v. Kovens, 60 Md. App. 619, 484 A.2d 275 (1984). The Court of Appeals granted certiorari, vacated the grant of summary judgment, and remanded for further proceedings.

O'Hara v. Kovens, 305 Md. 280, 503 A.2d 1313 (1986).[4]

Following remand, the Estate of Josephine O'Hara voluntarily dismissed with prejudice its claim against former Governor Marvin Mandel, and settled with the remaining defendants. In September of 1989, there was a jury trial solely on the issue of whether limitations barred the still-pending claims of James and Michael O'Hara in their individual capacities. During the trial, all defendants moved for judgment at the end of the plaintiffs' case and at the close of all evidence; those motion were denied. By special verdict, the jury found that limitations did not bar the claims because James and Michael O'Hara

[4]The facts are more fully set forth in these earlier reported opinions.

were not aware, and should not have been aware, before November 22, 1975, of any alleged wrong. Trial on the merits of the underlying claim was scheduled to begin on June 4, 1990.

On May 15, 1990, former Governor Mandel filed a motion to dismiss or for summary judgment on the ground that he was absolutely immune from liability. This motion was denied. Mandel then filed a notice of appeal and simultaneously filed a motion for stay of proceedings pending the appeal, accompanied by a petition for writ of certiorari to the Court of appeals. On June 1, 1990, this court entered an order staying all proceedings in the circuit court pending final disposition of the appeal and the Court of Appeals

entered an order issuing a writ of certiorari. On July 27, 1990, the Court of Appeals, in a comprehensive opinion, reversed the order denying Mandel's motion for summary judgment and remanded the case for judgment in his favor. Mandel v. O'Hara, 320 Md. 103, 576 A.2d 766 (1990). The court held that "as a matter of Maryland common law . . . a Governor of Maryland enjoys an absolute immunity from liability for damages for nonconstitutional torts based on the approval or veto of legislative enactments." 320 Md. at 134. The Mandate of the Court of Appeals was issued on September 5, 1990. As part of the mandate, the stay issued on June 1, 1990, by this court, was lifted.

On March 14, 1991, the remaining defendants filed a motion to dismiss or for summary judgment on the grounds that:

> (1) As a matter of law, the common law fraud claim was legally insufficient because it necessarily requires judicial inquiry into motives for a valid legislative act, which inquiry is forbidden by the separation of powers doctrine embodied in Article 8 of the Maryland Declaration of Rights.
>
> (2) As a matter of law, the common law fraud claim was legally insufficient because the allegations and undisputed facts failed to show any fraudulent misrepresentations or concealment of any material fact on which plaintiffs relied.
>
> (3) As a matter of law, punitive damages cannot be recovered from the estate of a deceased person and, to that extent, the claim against the personal representative of the late Irvin Kovens must be dismissed.

On April 1, 1991, Judge Kathleen O'Ferrall Friedman of the Circuit Court for Baltimore City entered an order granting summary judgment to all defendants on the basis of the first ground set forth above. Judge Friedman carefully explained the rationale for her decision as follows:

> Inherent in the issue of deceit is the Governor's motive in vetoing the legislation. Absent evidence of an improper motive on the Governor's part, there can be no deceit proven. Thus, the motive of the Governor is a material fact which cannot be separated from the deceit. However, the separation of powers doctrine prevents the judiciary from passing judgment on the Governor's motives for exercising a legislative function.
>
> Courts cannot be vested with the power to perform non-judicial functions in violation of the separation of powers doctrine. Because the court cannot inquire into or second-guess the motives underlying the Governor's exercise

> of his legislative powers, the plaintiff[s] cannot then establish the requisite material fact of deceitful motive that is necessary to continue his [sic] case.

(citations omitted.) Judge Friedman did not reach the remaining grounds for defendants' motions.

On appeal, the O'Haras raised a single issue:

> (1) Did the Circuit Court err in granting the defendant's motions for summary judgment on the ground that the separation of powers principle precluded further pursuit of this action against the defendants other than former Governor Mandel on the basis of the fraud alleged in the declaration?

On cross-appeal, the defendants raise the following additional issues:

> (2) Was the fraud claim properly dismissed because there was no misrepresentation of material fact but only a failure by the purchaser of corporate stock to identify the undisclosed principals for whom he was acting?

(3) Did the legally sufficient evidence at trial establish as a matter of law that the plaintiffs' fraud claim was barred by the statute of limitations?

(4) Does the death of an alleged tortfeaser who dies before judgment terminate liability for punitive damages?

Because we resolve the case on the basis of the first question, we need not, and do not, reach the others.[5]

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[5]We note that the Court of Appeals has repeatedly indicated its preference in this regard. See, e.g., Three Garden Village Ltd. Partnership v. United States Fidelity & Guaranty Co, 318 Md. 98, 107-108 (1989) ("the appellate court will not ordinarily undertake to sustain the judgment by ruling on another ground, not ruled upon by the trial court, if the alternative ground is one as to which the trial court had a discretion to deny summary judgment"); Geisz v. Greater Baltimore Medical Center, 313 Md. 301, 314 n.5 (1988) (same).

(ii)

The O'Haras assert three principal reasons why grant of summary judgment against them should be reversed. First, they maintain that they can make out "a prima facie case of fraudulent conspiracy" against the other defendants "without inquiring into the Governor's motives for vetoing the legislation." In Mandel v. O'Hara, supra, the Court of Appeals specifically rejected precisely this argument, holding:

> . . . The participation attributed to Governor Mandel in the alleged conspiracy is essential to any injury complained of by the plaintiffs, as well as to any computation of damages. Had Governor Mandel approved House Bill 1128 any negotiations by the O'Haras for the sale of their stock would have been for stock in a corporation entitled to, or to the use of, the additional racing days.

> Indeed, in O'Hara v. Kovens, 305 Md. 280, 503 A.2d 1313, we interpreted this same complaint to make the state of mind of Governor Mandel prior to the veto critical to the claim. Id. at 302, 503 A.2d at 1324. It was only because there were conflicting factual inferences whether a conspiracy antedated the veto and whether the reasons publicly given for the veto represented Governor Mandel's true reasons for the veto that the complaint escaped dismissal as a matter of law on limitations grounds. Id. at 302-03, 503 A.2d at 1324. We shall not permit the plaintiffs now to minimize the role of the veto in their theory of the case after they have made critical use of the veto to avoid the defense of limitations raised by all members of the Kovens Group.

320 Md. at 128-29 (emphasis added.)

The O'Haras' other two arguments are that no applicable precedent: (1) "prevents inquiry into former Governor Mandel's motives in vetoing legislation at issue now that Mr. Mandel has been offered immunity from liability," or (2)

entitles "private wrongdoers" to assert a "privilege of speech or debate in defending their own corrupt involvement in a scheme to manipulate the legislative process." In support of these arguments, the O'Haras cite numerous cases dealing with common law and constitutional (speech and debate)[6] legislative immunity. These cases and the O'Haras' arguments are relevant to the case at hand only if the basis for the grant of summary judgment was former Governor Mandel's legislative immunity or if the defendants are relying upon this immunity in urging that the court below be upheld. The O'Haras treat the case as if immunity was the basis for

[6] See United States Constitution, Article I §6; Maryland Declaration of Rights, Article 10; Constitution of Maryland, Article III, §18.

Judge Friedman's grant of summary judgment and that defendants are relying upon that argument in upholding her judgment. In fact, Judge Friedman in no way relied upon former Governor Mandel's legislative immunity or privilege in reaching her decision.

Moreover, the defendants in their briefs and in oral argument, have expressly disavowed any reliance upon this immunity or privilege. Rather, they assert that the case at hand "does not involve the scope of legislative privilege" but a separation of powers question, i.e., "whether the judicial branch is at liberty to inquire into the motives for the Governor's disapproval or veto of legislation."[7] Although

[7]Interestingly, one constitutional basis for legislative immunity is the

separation of powers doctrine. This is so because legislative immunity was designed foremost to prevent the legislative branch from being harassed by the executive or the judicial branch in retaliation for acts performed in the execution of legislative duties. As the Supreme Court explained in Gravel v. United States, 408 U.S. 606 (1972):

> The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process.

Id. at 616. See Powell v. McCormack, Speaker of the House of Representatives, 395 U.S. 486, 502-503 (1969); Soucie v. David, 448 F.2d 1067, 1081 (D.C. Cir. 1971) (Wilkey, J. concurring). See also Ann Woolhandler, Patterns of Official Immunity and Accountability, 37 Case W.L. Rev. 396, 407-08 (1987) ("The roots of [speech or debate] immunity are not only in the favored place of free speech generally, but also in the critical role of speech by government in separation of powers, particularly in a system that accepts extensive judicial review"); Robert J. Reinstein and Harvey A. Silvergate, Legislative Privilege and the Separation of Powers, 86 Harv. L.

defendants never indicate why they expressly disavow reliance on former Governor Mandel's legislative immunity, our reading of the legislative immunity cases suggests that it is because while one of the O'Haras' arguments as to that immunity is meritless, the other is correct and bars any reliance by these defendants on legislative immunity.

Thus, it seems clear that one who properly invokes legislative immunity can, contrary to the O'Haras' assertions, also invoke a legislative privilege not to testify. See, e.g., Gravel v. United States, supra, 408 U.S. at 616; Miller v. Transamerican Press,

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Rev. 1113, 1119 (1973) (speech and debate clause designed primarily to be invoked by congressmen in order to prevent executive intimidation and harassment).

Inc., 709 F.2d 524, 529 (9th Cir. 1983); United States v. Doe, 445 F.2d 753, 758 n.22 (1st Cir. 1972); In re Grand Jury Subpoena, 626 F. Supp. 1319, 1327-28 (M.D. Pa. 1986); United States v. People's Temple of the Disciples of Christ, 515 F. Supp. 246, 247 (D.D.C. 1981); Holmes v. Farmer, 475 A.2d 976, 983 (R.I. 1984); Kerttula v. Abood, 686 P.2d 1197, 1204-05 (Alaska 1984). On the other hand, it would seem to be equally clear that legislative immunity or privilege can only be asserted by the officer who possesses it, and not by others. See, e.g., Gravel, supra, 408 U.S. at 612 n.9; United States v. Reynolds, 345 U.S. 1, 7-8 (1953); Miller v. Transamerican Press, Inc., 709 F.2d at 527 n.1; Matter of Nelson, 131 F.R.D.

161, 164 (D. Neb. 1989). See also Carl Zeiss Stifting v. V.E.B. Carl Zeiss, Jena, 40 F.R.D. 318, 326 n.30 (D.D.C. 1966). Hence, the defendants well may have concluded that it would be futile for them to rely on former Governor Mandel's legislative immunity and privilege. In any event, they do not. Accordingly, we turn to the principal upon which they do rely and which formed the basis for the holding of the court below -- the separation of powers doctrine.

(iii)

There is no concept more fundamental to our system of government that the doctrine of separation of powers among the legislative, executive, and judicial branches. When President

George Washington first declined to furnish the House of Representatives with a document requested by it, he gave as his reasons for refusal:

> [i]t is essential to the due administration of the Government that the boundaries fixed by the Constitution between the different departments should be preserved, a just regard to the Constitution and to the duty of my office, under all the circumstances of this case, forbids a compliance with your request.

1 Richardson, Messages and Papers of the Presidents 196 (1986). The doctrine of separation of powers was adopted by the founders, as Justice Brandeis explained, "not to promote efficiency but to preclude the exercise of arbitrary power." Myers v. United States, 272 U.S. 52, 293 (1926) (dissenting opinion). Accordingly, it was intended "not to avoid friction, but, by means of

the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy." Id.

Although the separation of powers principle is evidenced by, and inferred from, the Constitution of the United States, there is no explicit federal constitutional provision articulating the doctrine. In contrast, in Maryland the doctrine "finds forthright expression," Department of Natural Resources v. Linchester Sand and Gravel, 274 Md. 211, 218 (1975), in Article 8 of the Declaration of Rights. Article 8 provides:

> That the Legislative, Executive and Judicial powers of Government ought to be forever separate and distinct from each other; and no person

> exercising the functions of one of said Departments shall assume or discharge the duties of any other.

One hundred and forty years ago, in Wright v. Wright's Lessee, 2 Md. 429 (1852),[8] the Court of Appeals carefully explained the purpose of the separation of powers provision:

> The evident purpose . . . is to parcel out and separate the powers of government, and to confide particular classes of them to particular branches of the supreme authority. That is to say, such of them as are judicial in

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[8]The Constitution of Maryland has always contained a separation of powers provision. The reference in Wright is to Article 6 of the Declaration of Rights in the Constitution of 1776, which provided as follows:

> That the legislative, executive and judicial powers of government, ought to be separate and distinct.

The additional clause in the present Constitution first appeared in Article 6 of the Declaration of Rights of the Constitution of 1851 and was repeated in Article 8 of the Declaration of Rights of the Constitution of 1864.

> their character to the judiciary; such as are legislative to the legislature, and such as are executive in their nature to the executive. Within the particular limits assigned to each, they are supreme and uncontrollable.

Id. at 452 (emphasis added). Moreover, the Court of Appeals has specifically recognized that "policy and intent" of the doctrine is:

> . . . that the Courts and Judges provided for in our system shall, not only, not be required but shall not be permitted to exercise any power or to perform any trust or to assume any duty not pertaining to or connected with the administering of the judicial function; and that the exercise of any power or trust or the assumption of any public duty other than such as pertain to the exercise of the judicial function is not only without constitutional warrant but against the constitutional mandate in respect to the powers they are to exercise and the character of duties they are to discharge.

Board of Supervisors v. Todd, 97 Md. 247, 263-4 (1903). Similarly, in Miles

v. Bradford, 22 Md. 170 (1864), the court held that the Governor in the exercise of discretionary duties is a "co-ordinate, separate, distinct and independent department of Government," and so is not subject to mandamus. Id. at 184-85. See also Kendall v. United States, 12 Pet. 524, 610 (1838); Worman v. Hazan, 78 Md. 152, 165 (1893).

The authority of each branch is, of course, only absolute within the powers which the constitution assigns to it. Springer v. Philippine Islands, 277 U.S. 189, 211 (1928) (Holmes, J. dissenting) ("we do not and cannot . . . divide the branches into watertight compartments"). Thus, the separation of powers concept encompasses "a sensible degree of elasticity" so that beyond the core

area, in response to "the practical needs of government," there has been "mingling" and "blending" of the "legislative, executive and judicial functions." Department of Natural Resources v. Linchester, supra, 274 Md. at 220. This "constitutional 'elasticity,'" however, cannot be "stretched to a point where, in effect, there no longer exists a separation of governmental power." Id. Accordingly, the separation of powers doctrine preserves to the one branch of government its essential functions and prohibits any other branch from interfering with our usurping those functions. See Shell Oil v. Supervisor of Assessments, 276 Md. 36, 46-47 (1975) (separation of powers doctrine preserves

to judicial branch its essential functions and prohibits legislative branch from usurping those functions).

The O'Haras do not argue (and presumably no one would argue) that a governor's veto power, a power expressly given to him by Article II, Section 17 of the Constitution of Maryland, is any thing other than an essential function of his office. See California State Employees' Ass'n v. State, 32 Cal. App. 3d 103, 109 (1973) ("the signing or vetoing of bills are acts inherently executive or political in nature, and the courts will not interfere with their performance since they require the exercise of judgment and discretion"). See also United States v. Nixon, 418 U.S. 683, 704 (1974) (judicial power of

courts can "no more be shared with the Executive Branch than the Chief Executive . . . can share with the Judiciary the veto power"). The real question here is whether judicial investigation into the governor's motives for exercising his veto power so encroaches upon the executive's essential functions as to be forbidden by the separation of powers doctrine. Although we have found no case directly on point, a fair reading of relevant caselaw indicates that the answer to this question can only be yes.

Whenever motives for legislative acts have been drawn into question, courts have invariably refused to authorize judicial inquiry into the motives for enactment or rejection of

the legislation. For example, in Fletcher v. Peck, 6 Cranch. 87 (1810), when a purchaser of land claimed that a legislative act under which the seller had obtained title was a nullity because of fraud and corruption on the part of the legislators enacting it, the Supreme Court held that courts could not undertake a collateral inquiry into legislative motives. Id. at 131. Chief Justice Marshall explained:

> It would be indecent, in the extreme, upon a private contract, between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a state. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the

> allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.

Id.

The holding of Fletcher v. Peck, that "it was not consonant with our scheme of government to inquire into the motives of legislators, has remained unquestioned." Tenny v. Brandhove, 341 U.S. 367, 377 (1951). Nor has this holding been confined to situations in which the legislators were parties to the lawsuit. See, e.g., Sugarloaf Citizens Assoc., Inc. v. Gudis, 319 Md. 558, 577-78 (1990) (citing numerous cases, including Fletcher v. Peck, supra); Montgomery County v. Maryland Soft Drink Assoc., Inc., 281 Md. 116, 133 (1977) ("we do not examine the motives of legislators"); County Council

for Montgomery County v. District Land Corp., 274 Md. 691, 704 (1975) ("the judicial branch of government cannot institute an inquiry into the motives of the legislature in the enactment of laws"); Hammond v. Lancaster, 194 Md. 462, 476 (1950) ("[w]e cannot inquire into the legislative motives").

The O'Haras seek to distinguish these cases by arguing that they "proscribe judicial inquiry" in the "context of judicial review of the legislation itself" and "fear of encroachment upon the legislative prerogative is much less of a serious consideration where the person whose acts are under scrutiny is the Executive, not a member of the legislative Branch." While a veto is

not legislation itself, in Mandel v. O'Hara, supra, Judge Rodowsky carefully explained why it was a legislative power, a "participation" in the "enactment of laws." Id. at 123 (quoting People v. Brown, 21 N.Y. 517, 521-22 (1860)). Moreover, no precedent suggests that the motives of a governor for vetoing legislation require more scrutiny or are less entitled to separation of powers protection than the motives of legislators in enacting legislation.[9]

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[9]The O'Haras' reliance on United States v. Gillock, 587 F.2d 284 (6th Cir. 1978), reversed on other grounds, 445 U.S. 360 (1980) is misplaced. There, the court only held that a state legislator "has no right to claim his speech and debate privilege as to the Governor's exercise of the gubernatorial right of veto." Id. at 294 (emphasis added). The court did not make any holding with regard to a governor's own assertion of legislative privilege with

There seems to be no reason for drawing such a distinction in light of the deference accorded the Executive's motivations for performing other functions of his office, even some which, unlike the veto power, are not explicitly set forth in the Constitution. See United States v. George S. Bush & Co., Inc., 310 U.S. 371 (1939); United States Cane Sugar Refiners Ass'n v. Block, 683 F.2d 399, 404 (U.S. Ct. of Cust. & Pat. App. 1982); Hamilton v. Verdow, 287 Md. 544, 556 (1980) ("principles behind the

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regard to the veto or as to any violation of the separation of powers doctrine. See Colorado General Assembly v. Lam, 709 P.2d 1371, 1385-86 (Colo. 1985) (in holding Governor improperly vetoed only portion of certain items, court noted that the "veto power of the governor, when validly exercised is plenary, and this court will not inquire into the justifications for its use").

constitutional separation of powers . . . place limits on a court's power to review or interfere with the conclusions, acts or decisions of a coordinate branch of government made within its own sphere of authority") (citations omitted); Maryland Action for Foster Children, Inc. v. State, 279 Md. 133, 152-53 (1977) ("Judiciary has no authority to control the Governor's discretion and require him to include more funds" in budget bill to implement statute pertaining to foster care program); Maryland Committee for Fair Representation v. Tawes, 228 Md. 412, 440 (1962) (power to call General Assembly into extraordinary session "is entirely within [the] discretion" of Governor and "courts cannot direct" him

to exercise such power); Duvall v. Lacy, 195 Md. 138, 149 (1950) ("no authority in judiciary to control the members of the executive department in carrying out their duties, so long as no plain violation of the Constitution or the law is found to exist"). See also Appeal of Hartranst, 85 Pa. 433, 445-6 (1877) (holding that governor "cannot be examined as to his reasons for not signing the bill, nor as to his action, in any respect, regarding it because . . . executive department is a co-ordinate branch of the government, with power to judge what should or should not be done, within its own department, and what of its own doings and communications should or should not be kept secret, and that with it in the

exercise of these constitutional powers, the courts have no more right to interfere, than has the executive, under like conditions, to interfere with the courts").

Moreover, this deference to the executive is accorded not only in cases in which the executive is a party, but also in those in which neither he nor any executive agency is a party. See, e.g., Pfizer, Inc. v. Government of India, 434 U.S. 308, 319-20 (1978) (in case not involving executive agency held a court must give "complete judicial deference" to "exclusive power of Executive Branch to determine" which nations are entitled to sue "in the courts of the United States"); Williams v. Suffolk Ins. Co., 38 U.S. 415, 420

(1839) (when executive has determined to what sovereignty Falkland Islands belong, that determination is "conclusive" upon judicial branch); Electronic Data Systems v. Social Security Organization of Government of Iran, 651 F.2d 1007, 1011 (5th Cir. 1981) ("It is for the United States Government [the Executive], not the court, to determine in the first instance the extent of its obligations under the Declarations").

In perhaps the seminal case in American jurisprudence, the Supreme Court made it clear that courts are not to "intermeddle with the prerogatives of the executive." Marbury v. Madison, 5 U.S. 137, 170 (1803). Chief Justice Marshall explained that any "legal

investigation of the acts of the President" is so "peculiarly irksome" that

> [i]t is scarcely necessary for the court to disclaim all pretenses to such jurisdiction. An extravagance, so absurd and excessive, could not be entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have discretion. Questions, in their nature political, or which are, by constitution and laws, submitted to the executive can never be made in this court.

Id.

These words and principles require our conclusion that the separation of powers doctrine bars judicial inquiry into a governor's motives for his veto. Since this action is dependent upon such

a judicial inquiry, the grant of summary judgment was proper.

JUDGMENT AFFIRMED.

COSTS TO BE PAID BY APPELLANTS.

JAMES FRANCIS O'HARA, III, et al.	*	In the
	*	Court of Appeals
v.	*	of Maryland
	*	Petition Docket No. 247
JACQUELINE KOVENS, As Personal Representative of the Estate of Irvin Kovens et al	*	September Term, 1982
	*	(No. 1305, September Term,
	*	1991, Court of Special Appeals)

O R D E R

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals and the answer and cross-petitions filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition and cross-petitions be, and they are, hereby, denied as there has been no showing that

review by certiorari is desirable and in the public interest.

Judges Eldridge and Karwacki did not participate in the consideration of this matter.

/s/ Robert C. Murphy
Chief Judge

Date: October 7, 1992

No. 92-1154

Supreme Court, U.S.
FILED
FEB 2 1993
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1992

JAMES FRANCIS O'HARA, III, *et al.*,
Petitioners,

vs.

JACQUELINE KOVENS, PERSON REPRESENTATIVE OF THE ESTATE OF IRVIN KOVENS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Court of Special Appeals of Maryland

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QUESTION PRESENTED

Whether the Court of Special Appeals of Maryland was correct in holding that the separation of powers doctrine embodied in Article 8, Maryland Declaration of Rights, forbids judicial inquiry into a former Maryland governor's motives for his veto of proposed legislation.

LIST OF PARTIES

Petitioners:

James Francis O'Hara, III

Michael Patrick O'Hara

Respondents*

Jacqueline Kovens, Personal Representative of the Estate of Irvin Kovens

W. Dale Hess

Harry W. Rodgers, III

William A. Rodgers

Ernest N. Cory, Jr.

The Eugene B. Casey Trust

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* The Petition incorrectly lists Irving T. Schwartz as a Respondent. (Petition, at ii). In fact, Petitioners voluntarily dismissed with prejudice their claims against Mr. Schwartz in 1990, prior to entry of final judgment by the Circuit Court for Baltimore City.

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No. 92-1154

In The

Supreme Court of the United States

October Term, 1992

JAMES FRANCIS O'HARA, III, *et al.*,

Petitioners,

vs.

JACQUELINE KOVENS, PERSONAL REPRESENTATIVE OF THE ESTATE OF IRVIN KOVENS, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Court of Special Appeals of Maryland

RESPONDENTS' BRIEF IN OPPOSITION

All Respondents join in this Brief in Opposition. For reasons stated, the Petition for Writ of Certiorari should be denied.

STATEMENT OF JURISDICTION

On May 8, 1992, the Court of Special Appeals entered judgment affirming the entry of summary judgment against Petitioners by the Circuit Court for Baltimore City. Petitioners filed in the Court of Appeals of Maryland a petition for writ of certiorari, but that petition was denied on October 7, 1992 (A.45a).

Jurisdiction is invoked pursuant to 28 U.S.C. § 1257. However, the Petition does not present any federal question that was timely and properly raised in the Maryland courts so as to give this Court jurisdiction.

STATEMENT OF THE CASE

Although the Petition seeks review of the judgment of a state court, its statement of the case does not even purport to specify the stage in the proceedings below at which the federal question sought to be reviewed was raised. Indeed, Petitioners fail to provide any explanation or record citations "as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ or certiorari." Rule 14.1(h). Noncompliance with this Court's rule, while inexcusable, is understandable. Petitioners never raised in the courts of Maryland any federal question which might be reviewable by this Court.

This civil action alleging common law fraud has been pending since November 22, 1978, when Petitioners filed it in the Circuit Court for Baltimore City. The allegations have been twice explored by the Court of Appeals of Maryland. According to that court, the fraud claim challenged the motives of Marvin Mandel, while governor of the State of Maryland, for his 1971 veto of a bill passed by the Maryland legislature. *O'Hara v. Kovens*, 305 Md. 280, 302, 503 A.2d 1313, 1324 (1986).[1] The complaint was interpreted as an

1. In Maryland, the power to veto or approve legislation is vested exclusively in the governor. Md. Const. Art. II, § 17. *See Mandel v. O'Hara*, 320 Md. 103, 121, 576 A.2d 766, 775 (1990). Under the Maryland Constitution, as construed, Governor Mandel's exercise of the veto power was a legislative function. *Id.*, 320 Md.at 121-125, 576 A.2d at 775-77. *Accord: Edwards v. United States*, 288 U.S. 482, 490 (1932); *Smiley v. Holm*, 285 U.S. 355, 370 (1932).

attempt by Petitioners "to make the state of mind of Governor Mandel prior to the veto critical to the claim." *Id. See Mandel v. O'Hara*, 320 Md. 103, 128, 576 A.2d 766, 778 (1990).

On March 14, 1991, in light of these authoritative pronouncements, Respondents filed a motion to dismiss or for summary judgment. The motion raised several issues, including the following question of Maryland constitutional law:

> (1) As a matter of law, the common law fraud claim was legally insufficient because it necessarily requires judicial inquiry into motives for a valid legislative act, which inquiry is forbidden by the separation of powers doctrine embodied by Article 8 of the Maryland Declaration of Rights.

(A.15a). *See* Petition, at 15-16. No question of federal law was raised.

On April 1, 1991, the Circuit Court entered a final order granting the motion for summary judgment. In its order,[2] the Circuit Court explained its decision as resting upon the separation of powers doctrine invoked by Respondents. The Circuit Court concluded that the doctrine prevented Maryland courts from passing judgment on Governor Mandel's motives for exercising the veto power, a material fact in issue (A.16a-17a).

On appeal, Petitioners presented a single question for review:

> (1) Did the Circuit Court err in granting the

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2. Contrary to Rule 14.1(k)(ii), the Appendix to the Petition does not contain the Circuit Court's order of April 1, 1991. However, a portion of that order was quoted in the opinion of the Court of Special Appeals (A.16a-17a).

> defendants' motion for summary judgment on the ground that the separation of powers principle precluded further pursuit of this action against the defendants other than former Governor Mandel on the basis of the fraud alleged in the declaration?

(A.17a). On May 8, 1992, the Court of Special Appeals of Maryland resolved that question under Article 8 of the Maryland Declaration of Rights (A.28a-31a). Its opinion concluded:

> . . . [T]he separation of powers doctrine bars judicial inquiry into a governor's motives for his veto. Since this action is dependent upon such a judicial inquiry, the grant of summary judgment was proper.

(A.44A-45a).

On June 22, 1992, Petitioner filed in the Court of Appeals of Maryland a timely petition for a writ of certiorari. The only question presented in that petition was framed exclusively in terms of state constitutional law:

> Did the Court of Special Appeals err in affirming the trial court's grant of summary judgment in favor of the respondents, on the grounds that State Constitutional separation of powers principles embodied in Article 8 of the Maryland Declaration of Rights would prevent any inquiry into or testimony concerning the motives underlying then-Governor Mandel's veto of pertinent racetrack legislation and a trial before a jury in the above-captioned case?

On October 7, 1992, the Court of Appeals denied that petition "as there has been no showing that review by certiorari is desirable and in the public interest" (A.46a-47a).

REASONS FOR DENYING THE WRIT

I.

THE DECISION BELOW WAS BASED UPON AN ADEQUATE AND INDEPENDENT STATE GROUND.

The decision below was based exclusively upon Article 8 of the Maryland Declaration of Rights, as construed by the courts of Maryland in light of Maryland precedents. Reliance upon a state constitutional provision is a classic example of an adequate and independent state ground for decision:

> This Court from the time of its foundation has adhered to the principle that it will not review judgments of State courts that rest on adequate and independent State grounds. . . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to review opinions. . . .

Herb v. Pitcairn, 324 U.S. 117, 125-26 (1945).

Here there can be no doubt that the decision below was based upon an adequate state ground. In moving for summary judgment,

Respondents explicitly invoked "the separation of powers doctrine embodied in Article 8 of the Maryland Declaration of Rights" (A.15a). Summary judgment was granted solely on that ground. Affirming, the Court of Special Appeals likewise identified Article 8 and prior Maryland decisions thereunder as the basis for its separation of powers decision (A.28a-37a, 36a-37a). Indeed, as a matter of state procedure, a Maryland appellate court ordinarily will "review a grant of summary judgment only on the grounds relied upon by the trial court." *Federated Department Stores. Inc. v. Le*, 324 Md. 71, 79, 595 A.2d 1067, 1071 (1991). *See, e.g., Three Garden Village Ltd. Partnership v. United States Fidelity & Guar. Co.*, 318 Md. 98, 107-08, 567 A.2d 85, 89 (1989).

Moreover, Petitioners frankly conceded below that the decision of the Court of Special Appeals rested upon state Constitutional separation of powers principles embodied in Article 8 of the Maryland Declaration of Rights. They so stated in their petition for writ of certiorari, as filed in the Court of Appeals of Maryland. It is rather late in the day for Petitioners to switch tactics and argue that the decision under the State Constitution should be viewed instead as resolving a question of federal law. Such an argument is baseless in any event.

Article 8 of the Maryland Declaration of Rights certainly provided an independent state ground. Since 1776, the Constitution of Maryland has always contained an explicit provision for separation of powers. That "doctrine has long been a cornerstone of this State's concept of government and finds forthright expression in Article 8 . . ." *Department of National Resources v. Linchester Sand and Gravel Corp.*, 274 Md. 211, 218, 334 A.2d 514, 520 (1975). Article 8 provides:

> That the Legislative, Executive, and Judicial powers of Government ought to be forever separate and distinct from each other; and no

> person exercising the functions of one of said Departments shall assume or discharge the duties of any other.

The decision below held under Article 8 "that the separation of powers doctrine bars judicial inquiry into a governor's motives for his veto." (A.44a). This determination, at most, merely adjusted the balance of power between the judicial and the executive branches of Maryland government. That decision did not arguably affect the separation of powers doctrine at the national level.

The interpretation of Article 8 of the Maryland Declaration of Rights is committed to the courts of Maryland. That interpretation is not subject to oversight by this Court. The Constitution of the United States does not require the States to apply the separation of powers doctrine in any particular manner. *Dreyer v. Illinois*, 187 U.S. 71, 83-84 (1902); *Prentis v. Atlantic Coast Line*, 211 U.S. 210, 225 (1908); *Mayor of Philadelphia v. Educational Quality League*, 415 U.S. 605, 615 and n. 13 (1974); *Whalen v. United States*, 445 U.S. 684, 689 n. 4 (1980).

The allocation of governmental powers in Maryland certainly gives rise to no federal question: "Whether the legislative, executive, and judicial powers of a State shall be kept altogether distinct and separate, or whether persons belonging to one department, may, in regard to some matters, exert powers which, strictly speaking, pertain to another department of government is for the determination of the State." *Dreyer v. Illinois, supra,* 187 U.S. at 84. *See Risser v. Thompson*, 930 F.2d 549, 551-52 (7th Cir. 1991) (per Posner, J.; governor's exercise of veto power is not subject to federal judicial review).

Article 8 of the Maryland Declaration of Rights — not federal law — was the basis of the decision below. The application of the doctrine embodied in Article 8 was exclusively for the

determination of the Maryland courts. It was resolved, appropriately enough, in favor of judicial restraint and was supported by ample Maryland precedents. That separation of powers decision is not reviewable in this Court.

II.

THE PETITION DOES NOT PRESENT A QUESTION OF FEDERAL LAW THAT WAS PROPERLY RAISED OR THAT IS SUBJECT TO THIS COURT'S REVIEW.

Petitioners are not aided by their belated and awkward effort in this Court to fashion a federal question out of the separation of powers doctrine. For the first time they contend here that the court below "proceeded to employ that doctrine in a manner that is a perversion of its role as an inherent and integral element of the republican form of government expressly guaranteed by the U.S. Const. Art. IV, § 4." (Petition at 17-18).

In truth, the Court of Special Appeals held only that the separation of powers doctrine bars judicial inquiry by courts and juries into a former governor's motives for his constitutional exercise of the veto power (A.2a, 44a). That holding was reasonable and, and, at minimum, does not conflict with any prior decision of this Court.[3] It hardly converts the Maryland executive into a monarch. The petition fails to explain why the holding should be vilified as a "perversion" of the republican form of

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3. Among the precedents discussed in the opinion below were two cornerstones of judicial review in a republican form of government, *Marbury v. Madison*, 5 Cranch 137 (1803), and *Fletcher v. Peck*, 6 Cranch 87 (1810) (A.35a-36a, 43a-44a).

government guaranteed by the Constitution.[4] In any event, the contention is unsupported by authority and may be dismissed as frivolous.

Two other deficiencies are dispositive. First, the Guarantee Clause was not briefed or argued in the trial court or the appellate courts of Maryland. Accordingly, the question sought to be raised in this Court was never considered or decided below. Second, as settled by decisions of this Court, questions arising under the Guarantee Clause are not justiciable, being reserved for the consideration of Congress and not the courts. *Baker v. Carr*, 369 U.S. 186, 228 (1962); *Cosgrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion); *Highland Farms Dairy Inc. v. Agnew*, 300 U.S. 608, 612 (1937); *State of Ohio ex rel. Bryant v. Akron Metropolitan Park Dist.*, 281 U.S. 74 (1930); *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 149-51 (1912). *See Risser v. Thompson*, 930 F.2d 549, 552 (7th Cir. 1991) (per Posner, J.; Wisconsin constitutional provision for "line-item veto" not justiciable under Guarantee Clause). This case does not warrant a departure from this longstanding rule.

CONCLUSION

The federal question sought to be presented to this Court was never raised in the proceedings below and is utterly lacking in merit. The decision below rests upon an adequate and independent state ground. Accordingly, the Petition for Writ of Certiorari should be denied.

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4. "Section 4. The United States shall guarantee to every State in the Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or the Executive (when the Legislature cannot be convened), against domestic Violence." Constitution of the United States, Art. IV, § 4.

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